82-1816

No.

In the Supreme Court of the United States

October Term, 1982

THE STATE OF OHIO,
Petitioner,

vs.

ANTHONY LIBERATORE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether in a trial wherein the accused stands charged with aggravated murder (felony murder) and aggravated arson (the underlying felony), and the jury returns a verdict of not guilty as to the underlying felony, and was unable to reach a verdict (hung jury) on the charge of felony murder, the verdict of acquittal automatically bars retrial on the count wherein the jury was unable to reach a verdict because of the double jeopardy provisions of the Constitution?

II. If the jury could have grounded its verdict in one offense on an issue other than that which the defendant seeks to foreclose from consideration as to the separate offense, then, would a retrial on the second offense constitute double jeopardy where the majority of the reviewing courts do not follow the prior dictates of this Court in making such determination?

III. Whether in criminal cases, the doctrine of collateral estoppel is to be employed with a hypertechnical approach? Should the reviewing court examine the entire record of the prior proceedings to determine if a jury could have founded its verdict on a rational basis that would not preclude retrial for a separate offense? This, despite a substantial overlap in the proof necessary to establish two or more crimes.

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To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINIONS OF THE COURT BELOW

The official report of the opinion by the Supreme Court of Ohio affirming the judgment of the Court of Appeals. Appendix at p. A1.

The Journal Entry of the Ohio Court of Appeals reversing the judgment of the Common Pleas Court. Appendix at p. A7.

The Decision and Journal Entry of the Court of Common Pleas, Cuyahoga County, Ohio overruling defendant's motion for judgment of acquittal, to dismiss the charge of aggravated murder, and, alternately, to bar a retrial of this charge as violative of defendant's right against double jeopardy. Appendix at pp. A30, A34.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on March 9, 1983. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVED

The relevant constitutional and statutory provisions involved herein are set forth in Appendix at pp. A36-A37.

(5th Amendment)

(14th Amendment)

Ohio Revised Code, Section 2903.01(B) Aggravated Murder

Ohio Revised Code, Section 2909.02 Aggravated Arson

STATEMENT OF THE CASE

The Respondent, Anthony Liberatore, was indicted by the Cuyahoga County Grand Jury on March 3, 1978 and charged with aggravated arson, Ohio Revised Code, Section 2909.02; aggravated murder, Ohio Revised Code, Section 2903.01(B), and engaging in organized crime, Ohio Revised Code, Section 2923.04. The Respondent stood trial on the charges of aggravated arson, and aggravated murder (felony murder). The third count of the indictment, engaging in organized crime, was dismissed.

The arson count of the indictment alleged that Anthony Liberatore and others, on or about October 6, 1977, in the

County of Cuyahoga, unlawfully and purposely and by means of fire or explosion, knowingly created a substantial risk of physical harm to Daniel Greene. The murder count of the indictment charged that Anthony Liberatore and others, on or about October 6, 1977, in the County of Cuyahoga, unlawfully and purposely caused the death of another, to-wit: Daniel Greene, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit aggravated arson.

The jury, after six days of deliberation, returned a verdict of not guilty to the arson charge. The Court declared a mistrial to the aggravated murder charge because the jury was unable to reach a verdict on that count. In declaring the mistrial, the Court held that the State was not prejudiced from proceeding again on the aggravated murder charge of the indictment.

The respondent, Anthony Liberatore, then filed a motion for judgment of acquittal, motion to dismiss and plea of former jeopardy. Said motions were all overruled by the trial court on February 6, 1981 (See Appendix at pp. A30, A34. Journal Entry and separate Decision).

On appeal to the Court of Appeals of Ohio, Eighth District, the Court on January 14, 1982, with one judge dissenting, reversed the judgment of the trial court holding that the double jeopardy clause of the United States and Ohio Constitutions precludes any subsequent prosecution of Anthony Liberatore as to the aggravated murder count (See Appendix at p. A7).

On further appeal to the Supreme Court of the State of Ohio, the Court, with two judges dissenting, affirmed the judgment of the Court of Appeals holding that the guarantees of double jeopardy prohibit retrial of an ac-

cused under R.C. 2903.01(B) after the accused has already been acquitted by the underlying felony at a previous trial (See Appendix at p. A1).

The trial evidence did show that at one time or another approximately sixteen persons were involved in the conspiracy to kill John Nardi, Daniel Greene and his associates. Included among the conspirators were: James Fratianno, Raymond Ferritto, James Licavoli, also known as Jack White, Ronald Carabbia, John Calandra, Thomas Lanci, Kenneth Ciarcia, Anthony Liberatore, Pasquale Cisternino, Louis Aratari, also known as Tony Aratari, or Tony DeMarco, and Ronald Guiles, also known as Renaldo Guiliani.

Raymond Ferritto, who previously pled guilty to the murder of Daniel Greene, and who had turned State's evidence, testified that some time between May and July, 1976, he and a long time friend and associate, James Fratianno, who resided in California, met with each other in Warren, Ohio. Fratianno discussed in detail with Ferritto the problems of the Cleveland family of organized crime, the problems they were having in controlling the town, and the fight that the Cleveland organization, and James Licavoli, also known as Jack White, was having with the John Nardi and Daniel Greene group. Fratianno told Ferritto that Greene and Nardi, ". . . were trying to cut in on the gambling and loan sharking in Cleveland, and that they would have to be taken care of . . . killed . . ." (R. 14-15).

Ferritto was told he would receive a lump sum payment, or that he would be made a member of the organization called "Our Thing" if he succeeded in killing Greene (R. 16-17).

In approximately April, 1977, Ferritto first learned from John Calandra that Anthony Liberatore was trying

to set up a meeting with Greene, and he was doing this because he was involved in union business with Greene (R. 19). On one occasion, Fratianno said to Ferritto, "Don't worry about him (Liberatore), he's one of us." (R. 47-48).

In discussions with John Calandra, Ronald Carabbia and Cisternino, Ferritto learned that Aratari and Guiles were working for Liberatore and that, ". . . they could be utilized in this Greene thing." (R. 37). When Ferritto met Aratari and Guiles, Aratari verified he was working for Tony Liberatore and that he was also trying to track down two of Greene's men (McTaggert and Ritson) to kill them (R. 39). Although their common objective was the same, the evidence shows that Ferritto, Carabbia and Cisternino were working separately from Aratari and Guiles in the attempt to track down and kill Greene.

Louis Aratari and Ronald Guiles, who were also indicted for the murder of Daniel Greene, both testified for the prosecution.

The evidence shows that Aratari first met Anthony Liberatore in 1976 (R. 193). Also, that he met and knew Lanci prior to August 15th, and Ciarcia shortly thereafter. Aratari also met Jack White and Calandra in the Murray Hill area.

On or about August 15, 1977, Aratari heard considerable conversation about the killing or attempted killing of Danny Greene. Lanci asked Aratari if he could do the job, and Aratari said sure (R. 221).

Lanci said he would talk to his uncle, Anthony Liberatore, who was at that time the business manager for Local 860 in the Laborers Union, and a member of the Regional Sewer Board. A couple of days later, on arrangements

made by Lanci, Aratari went to Liberatore's office and discussed with him the possibility of killing Danny Greene.

Aratari told Liberatore he could do the job. Liberatore stated that, "If you can make the hit on Greene, you don't have to worry about money no more". Liberatore also said, "There's two other guys (Ferritto and Carabbia) on the job, but you do it. I am going to put you on the job." (R. 225).

Aratari and Guiles both testified that they attended a wedding reception on September 24, 1977; that Lanci, Ciarcia and Liberatore were there (R. 617); that they discussed fast cars and guns to be used in the killing of Greene. On the same night of the wedding, Guiles and Aratari obtained a 30.06 rifle, on arrangements made by Lanci. The rifle was to be used by them to kill Greene.

Guiles testified that he met Lanci and Liberatore at the Roman Gardens and on two separate occasions, met Liberatore at a doughnut shop wherein the conversations all related to the killing of Danny Greene (R. 645 and 657). He testified that Liberatore said, ". . . Mr. White (Licavoli) wants this done (the killing of Greene) right away."

Ferritto and Carabbia learned that Greene had a dentist appointment on October 6, 1977 at Brainard Place, and conveyed that information to Aratari and Guiles (R. 295, 507-508).

On the morning of October 6th, Ferritto, Carabbia and Cisternino all met at an apartment in Willoughby Hills, Ohio. There they assembled the bomb (R. 55-56). Ferritto drove his 1973 Plymouth to Brainard Place, followed by Carabbia, who drove a 1970 Chevrolet Nova bomb car. There they met with Aratari and Guiles about one hour before Greene's appointment. The plan was that Aratari

and Guiles were to shoot Greene with the scoped rifle or that Ferritto and Carabbia use the bomb package to kill Greene if the opportunity presented itself (R. 59, 300-301, 311, 662).

When Greene's car arrived in the parking lot and Aratari and Guiles did not shoot Greene with the rifle, Ferritto backed the Nova car next to Greene's car and a dynamite charge was placed in a metal container on the passenger side which was adjacent to the driver's side of Greene's car. After the bomb car was positioned, Aratari and Guiles left the scene on orders from Ferritto and Carabbia. When Greene left the dentist's office and approached his car, the bomb was remotely detonated by Carabbia and Greene was killed immediately. At the time, Ferritto and Carabbia were in the 1973 Plymouth and driving slowly toward the entrance ramp of Interstate 271 (R. 61).

Daniel Greene died as a result of multiple explosive injuries of his trunk and extremities by a bomb blast, with resultant immediate fatal injury.

Shortly after the Greene killing Aratari received $5,000.00 from Lanci for his work. Aratari gave $2,000.00 of this amount to Guiles. Aratari also received approximately $2,000.00 in clothes from Lanci who was vice-president at Diamond's Clothes. He also got a job through Liberatore and Lanci working for a union at $300.00 per week.

ARGUMENTS RELIED UPON FOR ALLOWANCE OF WRIT

I. In a trial wherein the accused stands charged with Aggravated Murder (felony murder) and Aggravated Arson (the underlying felony), and the jury returns a verdict of not guilty as to the underlying felony, and was unable to reach a verdict (hung jury) on the charge of felony murder, the verdict of acquittal does not automatically bar retrial on the count wherein the jury was unable to reach a verdict.

The issues in this case involve a substantial constitutional question. In addition, the case is one of great public and general interest.

Clearly the State has a legitimate interest in prosecuting the defendant, Anthony Liberatore, for both the aggravated arson and the aggravated murder. The acquittal of the arson count should not of itself preclude retrial on the murder count of which the jury was unable to reach a verdict. The crime of aggravated murder is separate and distinct from that of aggravated arson.

The double jeopardy clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb". This Court has found the double jeopardy clause to consist of three separate guarantees. The double jeopardy clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969).

In the matter now before this Court, the respondent has not been convicted or acquitted of aggravated murder. Certainly he has not been punished therefore.

The Ohio Court of Appeals in its ruling in this case concedes that the two crimes, of which the defendant stood trial, were separate and distinct offenses, and held that despite the fact that the arson will serve as the underlying felony necessary to prove the aggravated murder, the two offenses are distinguishable under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). For purposes of double jeopardy, the Court in *Blockburger* held:

> "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not."

The elements of the two crimes as they affect this case are:

"Aggravated Arson, 2909.02

(1) By means of fire or explosion,

(2) Knowingly

(3) (a) Create substantial risk of serious physical harm to any person;"

"Aggravated Murder, 2903.01 (Division B)

(1) Purposely cause the death of another

(2) While committing, attempting to commit, fleeing immediately after committing or attempting to commit

(3) . . . aggravated arson. . ."

In some Ohio cases on double jeopardy, the courts have held, for example, in *State v. Rose*, 89 Ohio St. 383, at page 386, 106 N.E. 50, "the words 'same offense' mean same offense, not the same transaction, not the same acts, not the same circumstances or same situation." Likewise, in *State v. Strozier* (1972), 32 Ohio St. 2d 62, 66 the Court held:

> "The constitutional guaranty contained in Section 10, Article I of the Ohio Constitution, and the Fifth Amendment of the Federal Constitution, that no person shall 'be twice put in jeopardy,' applies only to being placed in jeopardy more than once for the same offense and not two separate offenses arising out of the same transactions, facts, circumstances or situation."

The concept of double jeopardy is against repeated trials for the same offense. It is not the intent of the State to re-try Anthony Libertore for an offense of which he was either acquitted or convicted. However, we do feel it proper to re-try him for an offense on which a jury was previously unable to reach a verdict. This, even though he would be required to run the so called "gantlet" twice.

II. Where the jury could have grounded its verdict in one offense on an issue other than that which the defendant seeks to foreclose from consideration as to the separate offense, then, a retrial on the second offense would not constitute double jeopardy. It is the obligation of the reviewing courts to make such a determination.

The Supreme Court of Ohio, in this case, *State v. Liberatore*, 4 Ohio St. 3d 13 (1983), in essence held that successive prosecutions are barred in certain circumstances "where the second prosecution requires the relitigation of factual issues already resolved by the first." On this

issue, dissenting opinions were written by both the Court of Appeals (see appendix) and the Supreme Court of Ohio.

The Court of Appeals in its dissent, held in part:

"On the basis of the evidence in this case, it is clear that there was one overall scheme to murder Greene, although the scheme involved more than one hit team. The evidence reasonably supports the conclusion that the appellant knowingly and purposely participated in the murder scheme and had actual knowledge of and assisted in coordinating the efforts of the two teams to carry out their joint ultimate objective, the killing of Daniel Greene. Although there does not appear to be any evidence that appellant directly communicated with Carabbia or Ferritto, or actually knew prior to the murder that the two had intended to use a bomb, appellant clearly knew that the two were engaged in the same murder scheme in which appellant was a participant. On these facts I would hold that appellant may be retried for aggravated murder in the commission of aggravated arson notwithstanding his acquittal for aggravated arson."

* * *

"The evidence in the record supports a reasonable conclusion that appellant purposely acted as an accomplice to Greene's murder while the principal murderers committed aggravated arson. * * * The fact that appellant has been acquitted of aggravated arson does not foreclose appellant's retrial for aggravated murder, since the state clearly is not proceeding against appellant on the theory that appellant himself committed or acted as an accomplice in the commission of aggravated arson."

* * *

> "I conclude that the jury, in acquitting appellant of aggravated arson, could rationally have based its verdict on the fact that the state did not prove that appellant had actual knowledge that aggravated arson (i.e., bombing) was to be committed. His acquittal of aggravated arson merely resolved the issue that appellant was not an accomplice to aggravated arson. A jury has not yet decided the issue of whether the appellant was an accomplice to a scheme to murder Daniel Greene and whether that ultimate objective was accomplished by the principals by means of aggravated arson. Thus, collateral estoppel does not preclude a second trial on the issue of whether appellant was an accomplice to aggravated murder. . ."

The Supreme Court of Ohio, in this case, in its dissent echoed the sentiments of the Court of Appeals stating in essence that, ". . . the State's theory was not that appellee committed aggravated arson; rather, that he participated in a scheme that had the murder of Daniel Greene as its ultimate goal."

Clearly, the dissenting opinions of both Courts conclude that respondent may be tried and convicted of aggravated murder as an accomplice . . . where the principals committed the aggravated arson even though the defendant himself was acquitted of the aggravated arson, and this by relitigation of the same factual issues.

Had the Ohio reviewing courts heeded the admonitions as set forth in *Ashe v. Swenson* (1970), 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469, and applied them to the entire record of this case, then, we feel, the results would have been different.

III. In criminal cases, the doctrine of collateral estoppel is not to be employed with a hypertechnical approach. The reviewing court should examine the entire record of the prior proceedings to determine if a jury could have founded its verdict on a rational basis that would not preclude retrial for a separate offense. This, despite a substantial overlap in the proof necessary to establish the separate offense.

The Supreme Court of the State of Ohio skirted the admonitions set forth in *Ashe, supra.* The Court did not indicate in their opinion that they took into account the pleadings, evidence, charge and other relevant matter and thereby conclude whether the jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

Both Ohio reviewing courts short shrifted the evidence in this case by stating in essence that to proceed on the murder charge would require relitigation of the aggravated arson charge of which the defendant had been acquitted. By adopting the doctrine of collateral estoppel in a hypertechnical manner, it is obvious the Ohio courts did so without taking into consideration the specific limitations and admonitions imposed thereon by this Court in *Ashe.*

In *Ashe v. Swenson, supra,* the Supreme Court held that the double jeopardy clause of the Fifth Amendment, now applicable to the states, incorporates the rule of collateral estoppel. The doctrine means simply ". . . that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit." In *Ashe,* at his first trial, he had been found not guilty of the armed robbery of one of a group of persons who had been robbed at the same time. The State then prosecuted

him for the armed robbery of another of the victims of the same robbery. Applying the rule of collateral estoppel, the Court held that the second prosecution was barred, because at both trials, ". . . the single rationally conceivable issue in dispute before the jury was whether petitioner had been one of the robbers." And this issue had been resolved in Ashe's favor by the jury's verdict of acquittal at the first trial.

The general verdict in *Ashe* did not cause particular difficulty in the Supreme Court decision. The Court concluded that the only real issue before the first jury was whether the defendant was one of the robbers. But in other cases, as the one here, involving complex statutory offenses, there may be many possible issues on which a rational jury could have based its general verdict.

This Court has held that even if two offenses are proved by the same evidence, the *Blockburger* test is satisfied as long as the statutory elements differ. *Iannelli v. U. S.*, 420 U.S. 770, 785 n.17 (1975) (if each offense requires proof of fact that other does not, overlap in evidence irrelevant); *U. S. v. Bankston,* 603 F.2d 528, 534 (5th Cir., 1979) (same); *United States v. Cowart,* 595 F.2d 1023, 1034 (5th Cir., 1979) (same).

In *United States v. Burkett,* 612 F.2d 449 (1979), the Court held acquittal on charges of importing a controlled substance or conspiring to import a controlled substance did not bar retrial, following a hung jury, on charges of conspiracy to possess and distribute a controlled substance or the substantive offense of possession with intent to distribute. This, even though the same set of facts would be necessary to prove either conspiracy. The Court held the appellants to be ". . . charged with four separate offenses as defined by four distinct federal criminal statutes." Therefore, an acquittal on some of the counts was not a bar to a retrial on the other counts.

The Ohio reviewing courts clearly erred in applying the doctrine of collateral estoppel to the facts of this case.

CONCLUSION

The legal concept of collateral estoppel, as applicable to criminal law, is rather novel in its application. This Court should re-examine *Ashe* and set forth in concrete or definitive terms the applicability of the rules propounded therein.

In *State v. Moss* (1982), 69 Ohio St. 2d 515, the Ohio Supreme Court noted:

> "The apparent clarity of both the federal and state constitutional proscriptions against former jeopardy notwithstanding, the Double Jeopardy Clause has spawned a series of judicial interpretations that comprise a veritable labyrinth which would confound even the brightest jurisprudential scholars."

Any attempt to loosen the Gordian knot of legal precedent in the area of double jeopardy would certainly be of benefit to the legal community as a whole.

Respectfully submitted,

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APPENDIX

OPINION AND DISSENTING OPINION OF THE SUPREME COURT OF OHIO

(Decided March 9, 1983)

No. 82-436

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO,
Appellant,

vs.

ANTHONY LIBERATORE,
Appellee.

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4 Ohio St. 3d 13

Criminal Law—double jeopardy: retrial of accused for aggravated murder under R. C. 2903.01(B) barred after accused acquitted of underlying felony in previous trial.

APPEAL from the Court of Appeals for Cuyahoga County.

On October 6, 1977, Daniel Greene was killed as he entered his car when a dynamite bomb, placed in the car parked next to his, was detonated by remote control. Anthony Liberatore, appellee herein, was indicted on three counts in connection with this incident: (1) aggravated arson (R. C. 2909.02); (2) aggravated murder (R. C.

2903.01[B]); and (3) engaging in organized crime (R. C. 2923.04).[1]

At trial, the state did not suggest that appellee acted directly or was present at any time an attempt was made to kill Greene. Rather, the state attempted to prove that appellee participated in an ongoing conspiracy to murder Greene.

Accordingly, the trial court instructed the jury on the law relating to complicity and conspiracy in connection with the aggravated arson charge, and incorporated both principles into its specific charge on aggravated murder. In so doing, the court set forth the elements which the state was required to prove in order to sustain a verdict of guilty on the charge of aggravated murder:

"* * * [T]he State must prove:

"First, that Daniel J. Greene was a living person, and that his death was caused by a principal offender or offenders in Cuyahoga County, Ohio, on or about October 6, 1977; and

"Second, that the killing was done purposely; and

"Third, that the killing was done while the principal offender or offenders were committing Aggravated Arson; and

"Four, that defendant did participate therein as an aider and abettor to such principal offender or offenders, and/or as a co-conspirator with them.

"* * *

"Then to sustain the charge of Aggravated Murder, the acts proximately causing the purposeful death must

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1. This count was dismissed before trial on the basis of *State v. Young* (1980), 62 Ohio St. 2d 370 [16 O. O. 3d 416], which held R. C. 2923.04 unconstitutional.

have been performed while—as an aider and abettor, and/or as a co-conspirator—the defendant was committing complicity in the commission of Aggravated Arson * * *." (Emphasis added.)

After lengthy deliberation, the jury returned a verdict of not guilty on the charge of aggravated arson, but announced that it was unable to reach a verdict on the charge of aggravated murder. The court thereupon accepted the verdict as to the former count and declared a mistrial as to the latter.

Appellee's motion for judgment of acquittal and motion to dismiss the remaining charge on the grounds of former jeopardy were denied.

Upon appeal, the court of appeals reversed the ruling of the trial court, holding that "* * * under the facts and indictment in this case, the double jeopardy provisions of the United States and Ohio Constitutions preclude a subsequent prosecution for aggravated murder * * * [since such prosecution] would necessitate a complete and identical relitigation of factual issues already resolved in the first trial."

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

MR. JOHN T. CORRIGAN, *prosecuting attorney*, and MR. ALBIN LIPOLD, *for appellant.*

MR. ELMER A. GIULIANI and MR. MARK R. DEVAN, *for appellee.*

Per Curiam. Where successive prosecutions are at stake, the double jeopardy guarantee serves "a constitutional policy of finality for the defendant's benefit." *United States v. Jorn* (1971), 400 U. S. 470, 479. That policy protects the accused for attempts to relitigate facts

underlying a prior acquittal. See *Ashe v. Swenson* (1970), 397 U. S. 436. The question in this case is whether that guarantee would be violated were the state to be allowed to proceed on an aggravated murder charge pursuant to R. C. 2903.01(B) after the accused had already been acquitted of the underlying felony at a previous trial.

The United States Supreme Court has held that the doctrine of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy. See *Ashe v. Swenson, supra,* at 445. In *State v. Thomas* (1980), 61 Ohio St. 2d 254 [15 O.O. 3d 262], this court fully applied this concept in holding, at paragraph four of the syllabus, that "* * * successive prosecutions [are] barred in certain circumstances *where the second prosecution requires the relitigation of factual issues already resolved by the first.*" (Emphasis added.) In so doing, we interpreted *Ashe* and its progeny, *Harris v. Oklahoma* (1977), 433 U. S. 682, to mean that "* * * a person may not be subjected to multiple prosecutions when proof of the one offense is necessary, as a practical matter, to prove the other, and both completed offenses arose out of the same criminal conduct." *Thomas,* at 261.

By definition, felony murder requires proof of the underlying felony in order to sustain a conviction under R. C. 2903.01(B). So too does the language of the instant indictment.[2] Any inquiry into Liberatore's participation in the alleged conspiracy to murder Greene would necessarily require proof that appellee had committed aggravated arson, an offense of which he had been previously acquit-

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2. The indictment for aggravated murder reads as follows:

"* * * Defendant * * * unlawfully and purposely caused the death of another, to wit: Daniel J. Greene *while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit Aggravated Arson.*" (Emphasis added.)

ted. The double jeopardy provisions of the federal and state constitutions would therefore bar subsequent prosecution on the aggravated murder charge. Cf. *Harris v. Oklahoma, supra.*

Accordingly, we hold that the guarantees of double jeopardy prohibit retrial of an accused under R. C. 2903.01(B) after the accused has already been acquitted by the underlying felony at a previous trial. The judgment of the court of appeals is therefore affirmed.

Judgment affirmed.

CELEBREZZE, *C.J.*, W. BROWN, SWEENEY, C. BROWN and J.P. CELEBREZZE, *JJ.*, concur.

LOCHER and HOLMES, *JJ.*, dissent.

HOLMES, J., dissenting. It is my position that although the principle of double jeopardy would preclude the retrial of the appellee for aggravated arson, such principle would not bar the retrial of appellee for aggravated murder. Consequently, I dissent.

The central question on appeal is whether the state must prove that appellee committed aggravated arson in order to convict him for aggravated murder. In my opinion, it is not necessary to do so here.

The state's theory was not that appellee actually committed aggravated arson; rather, that he participated in a scheme that had the murder of Daniel Greene as its ultimate goal.

As Judge Parrino said in his well-reasoned dissent to the court of appeals' decision:

"Where an accomplice enters into a common design which is reasonably likely to produce a certain result, he is equally guilty with the principal and other accomplices,

even though the accomplice did not actually know the means by which the principal would produce that result. See *State v. Scott* (1980), 61 Ohio St. 2d 155 [15 O.O. 3d 182]. * * * Accordingly, I would hold that where an accused, acting with a purpose to kill, is an accomplice to murder, and the principal causes the murder while committing aggravated arson, and where aggravated arson was a reasonably foreseeable consequence of the murder scheme, the culpability of the principal is attributable to the accomplice for the purposes of a charge and conviction of aggravated murder. Thus, * * * [appellee] may be tried for and convicted of aggravated murder as an accomplice where the * * * [principals] also committed aggravated arson even though * * * [appellee] himself was acquitted of aggravated arson."

Accordingly, I would reverse the judgment of the court of appeals and remand for a new trial on aggravated murder.

LOCHER, J., concurs in the foregoing dissenting opinion.

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS

(Dated January 14, 1982)

No. 43542

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,
Appellee,

vs.

ANTHONY LIBERATORE,
Appellant.

JOURNAL ENTRY AND OPINION

STILLMAN, *J.*:

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed, Each assignment of error was reviewed by the court and upon review the following disposition made:

This is an appeal by Anthony Liberatore, defendant below, from a judgment entered by the Cuyahoga County Court of Common Pleas on February 9, 1980, denying defendant's motion to enter a judgment of acquittal and to dismiss the second and remaining charge of aggravated

murder within the indictment and, alternatively, to bar a retrial of the aggravated murder charge as violative of defendant's right against double jeopardy. The appellant had been acquitted of aggravated arson and the jury had been unable to reach a verdict on the charge of aggravated murder at the trial below. The pertinent facts giving rise to defendant appellant's present appeal are as follows:

On October 6, 1977, Danny Greene was killed, as he entered his parked car, in the parking lot of Brainard Place, Lyndhurst, Ohio when a dynamite bomb, placed in the car parked next to Greene's, was detonated by remote control.

On March 3, 1978, the defendant-appellant Anthony Liberatore, was indicted by the Cuyahoga County Grand Jury. The indictment included three counts: aggravated arson (R.C. 2909.02);[1] aggravated murder (R.C. 2903.01 (B));[2] and engaging in organized crime (R.C. 2923.04).

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1. R.C. 2909.02 reads:

"(A) No person, by means of fire or explosion, shall knowingly:

(1) Create a substantial risk of serious physical harm to any person;

(2) Cause physical harm to any occupied structure.

(3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of serious physical harm to any person or of physical harm to any occupied structure.

(B) Whoever violates this section is guilty of aggravated arson, a felony of the first degree."

2. R.C. 2903.01(B) provides:

* * *

"(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape."

Also charged as co-defendants with appellant were Louis Aratari, Renaldo Guilliani a.k.a. Ronald Guiles, Kenneth Ciarcia, and Thomas Lanci. Before trial, the court dismissed the charge of engaging in organized crime pursuant to *State v. Young* (1980), 62 Ohio St. 2d 370, wherein the Supreme Court had declared R.C. 2923.04 unconstitutional.

The first count of the indictment alleged that appellant, Anthony Liberatore and others named, ". . . by means of fire or explosion, knowingly created a substantial risk of serious physical harm to Daniel J. Greene." The second count of the indictment charged that appellant, Anthony Liberatore and others named, ". . . purposely caused the death of another, to-wit: Daniel J. Greene while committing or attempting to commit aggravated arson."[3]

On October 6, 1980, the jury was impaneled and sworn. Raymond Ferritto had pled guilty to the murder of Danny Greene and turned State's evidence.

Ferritto testified that in 1976, he was contacted by James Fratianno to come to Warren, Ohio, from his residence in Erie, Pennsylvania. In Warren, Ohio, Ferritto met with Fratianno and Anthony Delsanter and after several meetings, plotted with various others to kill Greene. Ferritto was promised that, in exchange for killing Daniel Greene, he would receive a lump sum of money or be initiated into an organization known as "Our Thing."

Ferritto testified that he worked with Pasquale Cisternino, a.k.a. Butchie, and Ronald Carabbia in trying to locate and kill Danny Greene. Ferritto also testified that

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3. There were specifications included in this indictment for aggravated murder (R.C. 2903.01); however, these were stricken prior to trial.

he learned that two other men were to help him kill Greene. While at a Ramada Inn with Cisternino and Carabbia, Ferritto was introduced to Louis Aratari and Ronald Guiles a.k.a. Renoldo A. Guilliani. It was made known to Ferritto that Aratari and Guiles worked for defendant-appellant Anthony Liberatore. Subsequent to this meeting, Aratari and Guiles met with Ferritto, Cisternino and Carabbia. It was planned that these men would act as a "back-up team" to Ferritto and would shoot Greene with a rifle if Ferritto failed to kill him.

Ferritto further testified that he stalked Greene and listened to tape recordings of telephone conversations obtained by a tap on Greene's telephone. Through this telephone tap, Ferritto learned that Greene had made a dental appointment at Brainard Place in the afternoon of October 6, 1977.

On that date, Ferritto and Carabbia placed a "bomb car" next to Greene's automobile in the Brainard Place parking lot. After his appointment, as Danny Greene entered his automobile at approximately 3:30 p.m., Carabbia triggered the explosion which killed Greene. Carabbia and Ferritto then fled the scene.

Aratari and Guiles, likewise, confessed to their roles in the killing of Danny Greene. Aratari testified that he first met Anthony Liberatore, defendant-appellant, through a mutual acquaintance, Anthony Delmonte, Sr., who introduced Aratari for the purpose of finding employment. Aratari revealed that in the summer of 1977, he was recruited by Thomas Lanci, to participate in an ongoing conspiracy to murder Danny Greene. Thereafter, while at a wedding for Kenneth Ciarcia's stepdaughter, a conversation was had among Thomas Lanci, Kenneth Ciarcia, Louis Aratari, Ronald Guiles and appellant during which Aratari and Guiles agreed to assist in killing Danny Greene. Allegedly, weapons were to be furnished by

Lanci, automobiles by Ciarcia and money by James Licavoli, a.k.a. Jack White, through Anthony Liberatore.

Aratari further testified that he had met Anthony Liberatore, on two occasions at a doughnut restaurant. Appellant was in his automobile and Guiles and Aratari joined him. At these meetings, appellant was reported to have said that James Licavoli wanted Greene killed soon. Liberatore was also purported to have said that Aratari would never have to worry about money again and that he would be well respected in Cleveland.

Aratari's testimony corroborated Ferritto's testimony in that they had both met Liberatore through John Calandra at the Ramada Inn and that he, Aratari, subsequently acted as a back-up team along with Guiles at Brainard Place, on the day Greene was killed.

Ronald Guiles, a.k.a. Renoldo Guiliani, testified that he was contacted by Aratari to accompany Aratari to do what he, Guiles, believed to be collection work. Guiles' testimony corroborated that of Aratari's in that Guiles testified that he met Thomas Lanci, Kenneth Ciarcia and Anthony Liberatore at the wedding of Ciarcia's stepdaughter and that it was at this time that they agreed to locate and kill Danny Greene. Guiles corroborated Aratari's testimony that he went to a dance studio to pick up a rifle as arranged by Tom Lanci. Further, Guiles signed a false name on a title to an automobile supplied by Ciarcia, met with Aratari and Liberatore in a car at a doughnut shop and met with Ferritto, Carabbia, and Cisternino at the Ramada Inn to plan the killing of Greene. Finally, Guiles testified that he was present with Aratari, Ferritto and Carabbia at Brainard Place on October 6, 1977, but left prior to the explosion that killed Greene.

Lester Adelson, Deputy Coroner and senior pathologist, testified that Daniel Greene died as a result of

multiple explosive injuries of his trunk and extremities by a bomb blast which resulted in immediate fatal injury.

Shortly after the Greene killing, Aratari received $5,000 from Tom Lanci for his work. Aratari gave $2,000 of this Guiles. Aratari also was paid approximately $2,000 in clothes from Lanci who was a vice-president of a men's clothing store. Aratari also received a job through Liberatore and Lanci working for a union at $300 per week.

At the close of the state's case, the appellant moved for a judgment of acquittal pursuant to Crim. R. 29(A). This motion was renewed following the presentation of appellant's evidence and the state's rebuttal evidence. The motion was denied.

On November 6, 1980, the jury heard closing arguments and were instructed on the law applicable to the case.[4] These instructions included charges on complicity and conspiracy:

> "In brief summary, then, the Court says that several elements are required to be proved beyond a reasonable doubt before any claimed liability in complicity as a co-conspirator can attach to an accused. They are:
>
> "First, that a conspiracy,—that is, an agreement to accomplish an unlawful purpose—was formed and was existing at or about the time in question;
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> "Second, that the accused purposely and knowingly became a member of the conspiracy;
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> "Third, that one or more of the conspirators thereafter purposely and knowingly committed or effected

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4. These instructions were not objected to, nor are they in issue on this appeal.

a substantial overt act in furtherance of the object or purpose of the conspiracy.

"Then, as earlier mentioned, one cannot be convicted of a criminal offense as a co-conspirator with a principal offender unless it is established beyond a reasonable doubt that such co-conspirator acted or participated or conspired with the same kind of culpability—that is, with the same purposeful or knowledgeable mind—as that required of the principal offender or perpetrator for the commission of the offense charged. And generally speaking members of the jury, a conspiracy terminates when the offense which is its object is committed." (Tr. 968-973).

The court further incorporated both the complicity and conspiracy principles into its specific instructions on aggravated murder and stated that to find guilt of aggravated murder, the jury must find that the killing was committed during the commission of aggravated arson:

"Proceeding then to a consideration of the Second Count of the indictment, therein the State charges the defendant with the crime of Aggravated Murder, an offense proscribed by Section 2903.01 subsection (B) of the Revised Code of Ohio. As therein defined and so charged, Aggravated Murder is purposely causing the death of Daniel J. Greene while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit Aggravated Arson.

"Now, again, as earlier developed it can do so, the State is proceeding herein as though the defendant were charged with complicity in the offense of Aggravated Murder. So before you can find him guilty of aggravated murder as he stands charged in the Second Count of the indictment, you must find

that the State has established beyond a reasonable doubt, one, that he aided and abetted another or others in the commission of Aggravated Murder, and/or that he did conspire with another or others to commit the offense of aggravated murder incident to which a substantial overt act in furtherance of the conspiracy was performed by a co-conspirator after the defendant's entrance into the conspiracy; and two, that he did so purposely.

"In so doing the State must prove:

"First, that Daniel J. Greene was a living person, and that his death was caused by a principal offender or offenders in Cuyahoga County, Ohio, on or about October 6, 1977; and

"Second, that the killing was done purposely; and

"Third, that the killing was done while the principal offender or offenders were committing Aggravated Arson; and

"Four, that defendant did participate therein as an aider and abettor to such principal offender or offenders, and/or as a co-conspirator with them.

* * *

"Then to sustain the charge of Aggravated Murder, the acts proximately causing the purposeful death must have been performed while—as an aider and abettor, and/or as a co-conspirator—the defendant was committing complicity in the commission of Aggravated Arson; and this simply means that the killing must occur as a part or parts of acts leading up to, or occurring during, or immediately subsequent to the alleged Aggravated Arson, and that the killing was directly associated with the alleged Aggravated Arson. . . ." R. 979-982 (Emphasis added).

At the close of the court's instructions, the jury retired to deliberate. On November 11, 1980, the jury announced that they had reached a verdict on one count but were unable to reach a verdict on the second count. The court instructed the jurors to deliberate further and on November 12, 1980, the jury again reported its inability to reach a verdict on the remaining count. The court accepted the verdict of not guilty as to the first count of aggravated arson and declared a mistrial on the second count of aggravated murder and dismissed the jury, without prejudice to the prosecution, pursuant to R.C. 2945.36(B).

Appellant subsequently filed a motion for judgment of acquittal, motion to dismiss and plea of former jeopardy. On February 6, 1981, these motions were denied. Appellant now appeals this decision of the lower court assigning three errors:

First Assignment of Error:

> THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS ON GROUNDS OF FORMER JEOPARDY AND RETRIAL OF THE APPELLANT WILL VIOLATE THE DOCTRINE OF COLLATERAL ESTOPPEL AS GUARANTEED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Second Assignment of Error:

> THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS ON GROUNDS OF FORMER JEOPARDY ALTHOUGH THE APPELLANT HAS BEEN ACQUITTED OF A MATERIAL AND ESSENTIAL ELEMENT OF THE CRIME OF AGGRAVATED MURDER AS CHARGED IN THE INDICTMENT.

Third Assignment of Error:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS ON GROUNDS OF FORMER JEOPARDY ALTHOUGH THE COURT RULED THAT AGGRAVATED ARSON WAS THE OVERT ACT UPON WHICH THE APPELLANT WAS PROSECUTED AS A CO-CONSPIRATOR AND ALTHOUGH THE APPELLANT WAS ACQUITTED OF SAID OVERT ACT.

These assignments of error raise substantially one issue: whether the prosecution of appellant for aggravated murder is barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, or by Section 10, Article I, of the Ohio Constitution. More specifically, the substantive question presented is whether, in applying the double jeopardy provisions of the state and federal constitutions, a finding of not guilty of aggravated arson bars a subsequent prosecution of the defendant for aggravated murder where the indictment for aggravated murder requires defendant to have committed or to have attempted to commit aggravated arson.

The Double Jeopardy Clause of the Fifth Amendment is a guaranty against being twice put to trial for the same offense. *Abney v. United States* (1977), 431 U.S. 651, 661. This constitutional prohibition has been held to apply to state criminal proceedings. *Benton v. Maryland* (1969), 395 U.S. 784.

Collateral estoppel is a doctrine embodied within the Fifth Amendment guaranty against double jeopardy. It means that ". . . when an issue of ultimate fact has once been determined by a valid final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson* (1970), 397 U.S. 436, 443.

The concept of double jeopardy embodies a constitutional commitment against repeated trials for the same offense. In *Blockburger v. United States* (1932), 284 U.S. 299 the court stated:

> "the test to be applied to determine whether there are two offenses or only one, is whether each provision [i.e., each charge] requires *proof of a fact which the other does not.* (Emphasis added). *Id.* at 304.

This test focuses upon the elements of the two statutory provisions, not upon the evidence proffered in a given case. *Brown v. Ohio* (1977), 432 U.S. 161, 166. Accordingly, if each statute requires proof of an additional fact which the other does not, the state is not prohibited from seeking a conviction and punishment under both statutes in the same trial. Conversely, when the *Blockburger* test is not satisfied, the state is not permitted to seek multiple punishments.

The United States Supreme Court established a more stringent test in *Ashe v. Swenson* (1970), 397 U.S. 436, where it held that even if two offenses are sufficiently different to permit the imposition of multiple sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved in the first. This test has been adopted recently in Ohio. *See State v. Thomas* (1980), 61 Ohio St. 2d 255. Thus, when a factual issue necessary for conviction in a second trial has already been decided in the defendant's favor in the first trial, the Constitution requires the application of the collateral estoppel approach to insure the acquittal of a defendant in a second trial.

Applying the *Ashe* "replication of evidence" test, the Supreme Court in *Harris v. Oklahoma* (1977), 433 U.S. 682 held that:

> "When . . . conviction of a greater crime, murder, cannot be had without conviction of a lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater." *Id.* at 682.

In the case *sub judice* we have an acquittal of the crime of aggravated arson. The state seeks to prosecute appellant on the greater offense of aggravated murder. However, pursuant to the language of the indictment, a conviction on the aggravated murder charge cannot be had without conviction of the aggravated arson charge.[5]

In *State v. Thomas* (1980), 61 Ohio St. 2d 255, the court in commenting upon *Harris v. Oklahoma* (1977), 433 U.S. 682 said:

> ". . . the sequence of prosecutions is immaterial in modern double jeopardy analysis. *Brown, supra,* at page 168. The import of *Harris* is that a person may not be subjected to multiple prosecutions when proof of the one offense is necessary, as a practical matter, to prove the other, and both completed offenses arose out of the same criminal conduct." *Id.* at 261.

Therefore, in arriving at the solution to the ultimate issue presented here, two questions must be answered. First, whether the offense of aggravated arson and aggravated murder are distinguishable under the *Blockburger, supra,* standard, *i.e.,* does each of the crimes of aggravated arson and aggravated murder require proof of a fact which the other does not? Second, there being a less serious offense for which appellant has been tried and

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5. The indictment for aggravated murder reads as follows:

> ". . . Defendant . . . unlawfully and purposefully caused the death of another, to-wit: Daniel J. Greene while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit aggravated arson."

acquitted, is the state prohibited from relitigating the factual issues already resolved in the prior trial?

Answering the first inquiry, aggravated murder, R.C. 2903.01(B) requires proof of a fact which aggravated arson, R.C. 2909.02 does not: purposely causing the death of another. Conversely, aggravated arson requires proof of the commission or attempted commission through the use of fire or explosion which creates a substantial risk of serious physical harm to any person. Therefore, despite the fact that the arson will serve as the underlying felony necessary to prove aggravated murder, the two offenses are distinguishable under the *Blockburger* test.

The answer to the second question depends upon the circumstances that existed at the time of the trial and acquittal of the first count: aggravated arson. It is within the purview of this reviewing court to determine whether or not all of the operative facts necessary to the litigation of the second count: aggravated murder, have been disclosed at trial. *State v. Thomas, supra,* at 261.

A state is barred from further prosecution unless a jury verdict in a subsequent trial can be grounded upon an issue other than that which a defendant seeks to foreclose from consideration by virtue of its having been litigated in the first trial. *Simpson v. Florida* (1971), 403 U.S. 384.

Having carefully reviewed the record, we find all of the necessary operative facts to have been presented at the initial trial.[6] Moreover, a subsequent prosecution would require the relitigation of factual issues already resolved in the first trial. Specifically, the aggravated

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6. Counsel for the State conceded at oral argument that the evidence at a subsequent trial would be identical to that presented at the first trial.

murder charge would require relitigation of the aggravated arson charge of which defendant-appellant has been acquitted. In light of the holdings in *Ashe v. Swenson, supra;* and *Harris v. Oklahoma, supra,* the prosecution is barred from subsequently prosecuting the second offense. It follows that a later prosecution for aggravated murder arising out of the same criminal conduct as aggravated arson would be barred by the Double Jeopardy Clause:

> "The general rule banning multiple prosecutions for offenses arising out of the same course of conduct is intended to protect the defendant and the general public from the prosecution's misconduct. It insures that neither the defendant nor the public will be subjected to an unnecessary multiplication of legal expenses by conducting multiple trials when only one is necessary. It further insures that the accused will not be unduly harassed by being forced to 'run the gauntlet' more times than is necessary." *State v. Thomas, supra* at 263.

The State of Ohio in oral argument cited the case of *Illinois v. Vitale* (1980), 447 U.S. 410, in support of its view that double jeopardy is not a bar to the retrial of the appellant. In *Vitale* the question was whether the double jeopardy clause prohibited the State of Illinois from prosecuting, for involuntary manslaughter, the driver of an automobile involved in a fatal accident who previously had been convicted for failing to reduce speed to avoid the collision. The U.S. Supreme Court reversed the ruling of the Illinois Supreme Court, finding double jeopardy and determined that the "sameness" test of *Blockburger* may not be satisfied in *Vitale.* However, the U.S. Supreme Court did declare that "if in the pending manslaughter prosecution, Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, *Vitale* would have a

substantial claim of double jeopardy under the Fifth and Fourteenth Amendments to the U.S. Constitution." *Vitale* at 2267.

In our case, the aggravated murder prosecution would require the State of Ohio to rely upon and prove the aggravated arson as the act necessary to prove the aggravated murder. Since the appellant has been previously acquitted of this charge, he would appear to have the substantial claim of double jeopardy described by the U.S. Supreme Court available to him.

For these reasons we hold that under the facts and indictment in this case, the double jeopardy provisions of the United States and Ohio Constitutions preclude a subsequent prosecution for aggravated murder where the defendant-appellant has been acquitted of aggravated arson, an element specifically made necessary through the language of the aggravated murder indictment. A second prosecution on the aggravated murder charge would necessitate a complete and identical relitigation of factual issues already resolved in the first trial.

Accordingly, the judgment of the lower court is reversed.

This cause is reversed.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ SAUL G. STILLMAN*
Judge

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*(Retired of the Eighth Appellate District, Sitting by Assignment)

DAY, *P.J.*, concurs
(See Concurring Opinion,
DAY, *P.J.*, attached)

PARRINO, *J.*, Dissents
(See Dissenting Opinion,
PARRINO, *J.*, attached)

JOURNAL ENTRY AND OPINION

DAY, *P.J.*, Concurring:

I concur in the judgment for the reasons stated in the two final paragraphs of Judge Stillman's opinion. The conclusions of those paragraphs are compelled by *Ashe v. Swenson* (1970), 397 U.S. 436, 443, 25 L.Ed. 2d 469, 475. In my view nothing further need be said.

DISSENTING JOURNAL ENTRY AND OPINION

PARRINO, *J.*, Dissents:

I respectfully dissent.

I wish to supplement the facts recited by the majority with additional facts which I find critical to a determination of the issues of this case. The evidence reveals an on-going scheme, involving more than a dozen men, to murder Daniel Greene. Jack White, a.k.a. James Licavoli (hereinafter White) was the individual who initially ordered Greene's death. In furtherance of White's desires, Ronald Carabbia and Raymond Ferritto were teamed for the purpose of killing Greene by means of a bomb (for convenience, hereinafter referred to as "the bomb team"). The bomb team made several unsuccessful efforts to kill Greene as he entered or exited his apartment building. Because of White's displeasure at the bomb team's lack of success, appellant, who was described as being "second" to White (Tr. 226-227, 329), organized a

team of hit men to assist the bomb team. This second team (for convenience, hereinafter referred to as "the marksmen team") was composed of Louis Aratari, a.k.a Tony, and Victor Guiles, a.k.a Renaldo Guiliani (hereinafter Guiles). Appellant directed the marksmen team to act as a backup for the other team (Tr. 225-226, 244, 543, 591-592). Appellant instructed the marksmen team to go to the Ramada Inn for a meeting with the other team to be held at a particular time. The marksmen team went to the Ramada Inn as instructed by appellant and met the members of the other team. (Tr. 262-264, 644-649). The two teams initially planned to jointly ambush Greene at his apartment, but this plan was aborted. Appellant later met with the marksmen team at a doughnut shop, inquired about the other hit team, and urged that the murder be committed promptly. (Tr. 656-657).

The members of the bomb team learned that Greene had a dentist appointment on October 6, at Brainard Place, and conveyed that information to the marksmen team (Tr. 295, 507-508). There is evidence that the two teams met on October 5 to review their plans. (Tr. 719-721).

On October 6, both teams met in the Brainard Place parking lot one hour before Greene's appointment. The plan was that if no parking space was available next to Greene's car in which to park the bomb car, then the marksmen team was to shoot Greene. (Tr. 300-301, 662-663). After Greene arrived and entered the building the bomb team was able to park the bomb car next to Greene's car. Only at this time did the marksmen team leave the scene, on the orders of the bomb team. (Tr. 304-305, 664-665).

Following the murder, appellant arranged for Aratari to obtain a union job (Tr. 332-334) and, through Thomas Lanci, receive $5,000 in cash which Aratari was to divide

with Guiles. (Tr. 324-334, 528-534). Aratari subsequently learned that Ferritto had been offered substantially more for his participation in the murder. When Aratari confronted appellant with this fact, appellant replied that Aratari was entitled to less since he "didn't actually push the button." (Tr. 336).

On the basis of the evidence in this case, it is clear that there was one overall scheme to murder Greene, although the scheme involved more than one hit team. The evidence reasonably supports the conclusion that the appellant knowingly and purposely participated in the murder scheme and had actual knowledge of and assisted in coordinating the efforts of the two teams to carry out their joint ultimate objective, the killing of Daniel Greene. Although there does not appear to be any evidence that appellant directly communicated with Carabbia or Ferritto, or actually knew prior to the murder that the two had intended to use a bomb, appellant clearly knew that the two were engaged in the same murder scheme in which appellant was a participant. On these facts I would hold that appellant may be retried for aggravated murder in the commission of aggravated arson notwithstanding his acquittal for aggravated arson.

The majority opinion cites *Harris v. Oklahoma* (1977), 433 U.S. 682, and *State v. Thomas* (1980), 61 Ohio St. 2d 254, for the proposition that a person may not be subjected to multiple prosecutions when proof of the one offense is necessary, as a practical matter, to prove the other, and both completed offenses arose out of the same criminal conduct. However, in my opinion the facts and law in the case at bar do not involve such a situation.

Aggravated murder, as charged in the instant indictment, is defined in R.C. 2903.01(B) as follows:

> "No person shall purposely cause the death of another while committing . . . aggravated arson. . . ."

The issue is whether it is necessary to prove, as a practical matter, that appellant committed or was an accomplice in the commission of aggravated arson in order to prove that he was an accomplice to aggravated murder. *Harris v. Oklahoma, supra,* relied on state judicial construction for the proposition that proof of the underlying felony (robbery with firearms) was needed to prove the intent necessary for a felony-murder conviction. However, in the case at bar, as distinguished from *Harris,* the fact that appellant clearly was not at the scene of the murder, and thus could only be guilty of aggravated murder under a theory of complicity, complicates the double jeopardy analysis.

Where an accomplice enters into a common design which is reasonably likely to produce a certain result, he is equally guilty with the principal and other accomplices, even though the accomplice did not actually know the means by which the principal would produce that result. *See State v. Scott* (1980), 61 Ohio St. 2d 155; *State v. Palfy* (1967), 11 Ohio App. 2d 142. Accordingly, I would hold that where an accused, acting with a purpose to kill, is an accomplice to murder, and the principal causes the murder while committing aggravated arson, and where aggravated arson was a reasonably foreseeable consequence of the murder scheme, the culpability of the principal is attributable to the accomplice for the purposes of a charge and conviction of aggravated murder. Thus, appellant may be tried for and convicted of aggravated murder as an accomplice where the principal murderers Carabbia and Ferritto also committed aggravated arson even though appellant himself was acquitted of aggravated arson.

This conclusion is consistent with this court's holding in *State v. Lanci* (Cuya. Cty. Ct. App., Sept. 25, 1980), Unrep. Case Nos. 39907, 39906. The facts in *Lanci* are

identical to those in the case at bar because the appellants therein were also defendants in the murder of Daniel Greene. The jury found the appellants not guilty of aggravated arson but guilty of aggravated murder (while committing aggravated arson). The appellants sought to reverse the aggravated murder convictions on the grounds that they were inconsistent with the acquittals of aggravated arson, but this court rejected that argument.

Moreover, the above conclusion is consistent with the United States Supreme Court cases cited in the majority opinion. In *Illinois v. Vitale* (1980), 447 U.S. 410, the defendant while driving an automobile struck and killed two pedestrians. The defendant was found guilty of the traffic offense of failure to reduce speed to avoid an accident. Defendant was subsequently charged with involuntary manslaughter, which charge he challenged on the grounds of double jeopardy. The Supreme Court found no violation of double jeopardy. The court noted that although the manslaughter charge could be proved by showing that the defendant recklessly failed to reduce his speed to avoid an accident, the charge could also be proved by the showing of a number of other reckless acts such as failure to maintain brakes, speeding, disregard of school zone signs, etc. So long as the prosecution did not attempt to sustain the manslaughter charge on the identical conduct for which the defendant had been previously convicted (*i.e.*, failure to reduce speed to avoid an accident), the defendant could be tried for the manslaughter offense which arose from the same incident without violating his constitutional right against double jeopardy. Thus, although a particular issue may have been litigated and resolved in a prior proceeding, an accused may be subsequently tried for an offense arising from the same transaction so long as that particular issue is not relitigated therein.

The evidence in the record supports a reasonable conclusion that appellant purposely acted as an accomplice to Greene's murder while the principal murderers committed aggravated arson. Appellant has been neither convicted nor acquitted of this offense, since the jury was hung on the count of aggravated murder. The fact that appellant has been acquitted of aggravated arson does not foreclose appellant's retrial for aggravated murder, since the state clearly is not proceeding against appellant on the theory that appellant himself committed or acted as an accomplice in the commission of aggravated arson.

Several Supreme Court cases have precluded subsequent prosecutions on the theory of collateral estoppel. In *Ashe v. Swenson* (1970), 397 U.S. 436, "the single rationally conceivable issue in the dispute before the jury was whether the petitioner had been one of the robbers." The court concluded that since this issue had once been determined in the petitioner's favor in a trial as to one of the robbery victims, the issue could not be relitigated as to a second victim of the same robbery. The court made it clear, however, that collateral estoppel does not preclude subsequent prosecution where a rational jury could have based its verdict on an issue other than the one which the accused seeks to foreclose:

> "[T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue

> other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.* at 444 (citations omitted).

Accord, Simpson v. Florida (1971), 403 U.S. 384.

As in *Ashe* and *Simpson, supra,* the issue in dispute in *Turner v. Arkansas* (1972), 407 U.S. 366, was identity—whether the defendant was the assailant at the scene of the crime. Since the defendant had been acquitted of murder and aiding and abetting the commission of murder, the only logical conclusion was that he was not at the scene of the crime and thus could not be tried subsequently for the robbery which occurred concurrently with the murder. "The crucial question," the court stated, "is what issues a general verdict of acquittal at the [former] trial resolved." *Id.* at 369.

In *Ashe, Simpson,* and *Turner,* the critical issue was identity. Collateral estoppel applied to the latter trial because the acquittal in the former trial could have meant only one thing—that the accused was not the assailant at the scene of the crime. In the case at bar, however, identity is not at issue. There is no question that Carabbia and Ferritto were the principals. The issues at trial were whether appellant was an accomplice to aggravated arson and aggravated murder. Our task under *Ashe, Simpson,* and *Turner* is to determine what issues have been resolved by appellant's acquittal of aggravated arson.[1]

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1. *See also United States v. Burkett* (9th Cir. 1979), 612 F.2d 449, *cert. denied sub nom. Toughill v. United States* (1980), 447 U.S. 905, holding that where the defendant had been acquitted of illegal importation of cocaine, but the jury was hung as to conspiracy to import, conspiracy to disperse and distribute, and possession with intent to distribute cocaine, retrial as to

(Continued on following page)

I conclude that the jury, in acquitting appellant of aggravated arson, could rationally have based its verdict on the fact that the state did not prove that appellant had actual knowledge that aggravated arson (*i.e.*, bombing) was to be committed.[2] His acquittal of aggravated arson merely resolved the issue that appellant was not an accomplice to aggravated arson. A jury has not yet decided the issue of whether the appellant was an accomplice to a scheme to murder Daniel Greene and whether that ultimate objective was accomplished by the principals by means of aggravated arson. Thus, collateral estoppel does not preclude a second trial on the issue of whether appellant was an accomplice to aggravated murder where the principals Carabbia and Ferrito committed the underlying aggravated arson to accomplish the killing and thereby achieved the goal of all the co-conspirators.

Accordingly, I would affirm the decision of the trial court.

Footnote continued—

those counts does not constitute double jeopardy since the acquittal could have been based on issues other than criminal intent; and *United States v. Smith* (5th Cir. 1973), 470 F.2d 1299, *cert. denied,* 441 U.S. 952, holding that where the jury reasonably could have concluded from the evidence that the defendant had forged a Treasury check but did not cash it, the defendant's acquittal for uttering did not bar subsequent prosecution for forgery on double jeopardy grounds.

2. Aggravated arson is defined in R.C. 2909.02, which provides in part:

"(A) No person, by means of fire or explosion, shall knowingly:

"(1) Create a substantial risk of serious physical harm to any person. . . ."

The complicity statute, R.C. 2923.03, requires the accomplice to act with the kind of culpability required for the commission of the underlying offense (in this case "knowingly").

DECISION OF THE COURT OF COMMON PLEAS

(Dated February 6, 1981)

Case No. CR 38 130

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

ANTHONY LIBERATORE,
Defendant.

DECISION

This case is presently before the court on the motion of defendant (1) to enter a judgment of acquittal and dismiss the second and remaining charge of Aggravated Murder within the indictment, and, alternately, (2) to bar a retrial of this charge as violative of defendant's right against double jeopardy.

After careful consideration thereof and of the memorandums of counsel, the court finds neither prong of said motion to be well taken, and that each of them should be denied.

It would be repetitive to summarize the facts inasmuch as, except for the omission of defendant's insistence that the jury be *not* instructed on lesser offenses included within Aggravated Murder, they are well collated in each memorandum. And as so outlined and argued, it is virtually conceded that, after six full days of deliberation, the court was fully warranted in discharging the jury without

prejudice to the prosecution, pursuant to R. C. Sec. 2945.36(B), because of there being no probability of the jurors agreeing upon a verdict with respect to the second count of the indictment charging him with Aggravated Murder.

Defendant further contends, however, that principles of double jeopardy require the court to enter a dismissal of the second count. Whether this issue can be properly raised at this juncture under Crim. R. 29 seems questionable, for it would certainly appear to be anticipatory and premature. Nonetheless, the state has not seen fit to so challenge the motion but rather argues the inapplicability of the prohibition.

The prohibition is found in the 5th amendment to the U. S. Constitution (made applicable to the states in *Benton v. Maryland,* 395 U.S. 784 (1969), and in Section 10, Article I of the Constitution of Ohio. Each provides that no person shall be twice put in jeopardy for the *same offense.*

In determining when multiple prosecutions for the "same offense" are constitutionally proscribed, the courts have developed two broad tests. These are known as the "same evidence" tests and the "same transaction" tests.

Ohio, in accord with a clear majority of jurisdictions, including the United States Supreme Court, employs the "same evidence" test. In *State v. Thomas,* 61 Ohio St. 2d 254, 15 O O3d 262 (1980), Justice Holmes, speaking for a unanimous court, writes:

> "In *Blockburger v. United States,* 284 U.S. 299 (1932), the court, at page 304, set out the test to be used in determining whether two statutory provisions are sufficiently distinguishable to permit the infliction of multiple punishments:

'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not, * * *'

'This test,' continues Justice Holmes, 'focuses upon the elements of the two statutory provisions, not upon the evidence proffered in a given case. *Brown v. Ohio,* 432 U. S. 161 (1977); *Iannelli v. United States,* 420 U. S. 770, 785 (1975), at n. 17. Accordingly, if each statute requires proof of an additional fact which the other does not, the state is not prohibited from seeking a conviction and punishment under both statutes in the same trial. *Gavieres v. United States,* 220 U. S. 338, 342-343 (1911). Conversely, when the *Blockburger* test is not satisfied, the state is not permitted to seek multiple punishments."

Aggravated Arson is not a lesser offense included within Aggravated Murder (to purposely cause the death of another while committing Aggravated Arson). To argue, as does counsel for defendant, the "same transaction" test as being applicable to the issues sub judice is simply not warranted by Ohio law.

It is also argued by counsel that the principle of collateral estoppel bars defendant's retrial for aggravated murder. In *Ashe v. Swenson,* 397 U. S. 436 (1970), the Supreme Court held that the 5th Amendment guarantee against double jeopardy embodies the federal rule of collateral estoppel in criminal cases; and in *State v. Thomas,* supra, Ohio purportedly adopted this position. The Court in *Ashe,* at pp. 452-54, established the following framework:

> "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded the verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

The defendant seeks to foreclose from further consideration the issues of whether, as an aider and abettor or as a co-conspirator, he is criminally responsible or accountable for the murder or for an attempt to murder Daniel J. Greene. These ultimate issues, at defendant's insistence, were not positively resolved in his favor. Hence, collateral estoppel is not applicable. Cf., *United States v. Smith*, 470 F. 2d 1299 (5th Cir. 1973).

And lastly, counsel contends that his acquittal of Aggravated Arson precludes defendant's being possibly convicted of Aggravated Murder or of a lesser included offense on statutory grounds, i.e., R. C. Section 2923.01(B). In arguing so, he necessarily assumes that defendant's claimed complicity is predicated solely on a role as co-conspirator. This is simply contrary to fact, for the evidence embraced all facets of complicity, including soliciting and procuring, and aiding and abetting, as well as conspiring to commit the substantive offense.

From this analysis, as before mentioned, the motion of defendant should be denied. This ruling is incorporated in an accompanying journal entry.

/s/ ROBERT G. TAGUE
Judge, Sitting by Assignment

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Dated February 6, 1981)

Case No. CR 38 130

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

ANTHONY LIBERATORE,
Defendant.

JOURNAL ENTRY

This case is presently before the court on the motion of defendant to render a judgment of acquittal and to dismiss the second and remaining charge of Aggravated Murder within the indictment, together with the memorandums of counsel.

After careful consideration thereof, as delineated in an accompanying Decision filed herein, the court finds said motion and all branches or prongs thereof to be not well taken. Accordingly, it is Ordered that the aforesaid motion be, and it hereby is, denied.

/s/ ROBERT G. TAGUE
Judge, Sitting by Assignment

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Dated March 9, 1983)

No. 82-436

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO,
Appellant,

vs.

ANTHONY LIBERATORE,
Appellee.

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

OHIO REVISED CODE

2903.01 Aggravated Murder

. . .

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

2909.02 Aggravated Arson

(A) No person, by means of fire or explosion, shall knowingly:

(1) Create a substantial risk of serious physical harm to any person; . . .

THE CONSTITUTION OF THE UNITED STATES

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14; Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.